OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., 2415 E. Camelback Road, Suite 800 Phoenix, AZ 85016 Telephone: 602.778.3700 Fax: 602.778.3750 Thomas M. Stanek Thomas.Stanek@ogletreedeakins.com Elizabeth M. Townsend Elizabeth.Townsend@ogletreedeakins.com

Attorneys for Browning-Ferris Industries of California, Inc.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 32

BROWNING-FERRIS INDUSTRIES OF CALIFORNIA, INC., D/B/A BFI NEWBY ISLAND RECYCLERY)))
Respondent,))
LEADPOINT) Case No. 32-RC-109684
Respondent,) OPPOSITION TO PETITIONER'S
and) MOTION FOR THE BOARD TO) TAKE ADMINISTRATIVE
TEAMSTERS LOCAL 350,) NOTICE
Petitioner)

Browning-Ferris Industries of California, Inc. ("BFI") respectfully opposes Petitioner's Motion for the Board to Take Administrative Notice. The documents attached to Petitioner's Motion are inappropriate for judicial notice under Federal Rule of Evidence 201 as they constitute inadmissible hearsay that does not involve a party to this proceeding, are subject to reasonable dispute and are irrelevant to the issues raised in the Request for Review.

First, the correspondence and attachments identified as Attachments A & B are hearsay and not properly admissible without authentication and after the administrative record has closed. See Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 918 n.3 (9th Cir. 2006) (declining to take judicial notice of FAA handbook changes on appeal when changes went into effect after trial and documents were not before the trial court). Furthermore, as noted in the correspondence in Attachment B, the Franchise Agreement at issue is between the City of San Jose and Franchisee Allied Waste Services of North American, LLC dba Allied Waste Services of Santa Clara County ("Allied Waste Services of Santa Clara County"), which is a different legal entity than BFI. See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1247-48 (E.D. Pa. 1980) (parent company and subsidiary company are typically considered separate parties for hearsay exception purposes), aff'd in part, rev'd in part on other grounds, 723 F.2d 238 (3rd Cir. 1983), cert. granted in part and rev'd on other grounds, 475 U.S. 574 (1986).

Second, the December 16, 2013 Notice of Violation ("Notice") is not subject to judicial notice as it is "subject to reasonable dispute." Fed. R. Evid. 201(b) ("A judicially

noticed fact must be one not subject to reasonable dispute "). As can be seen from the correspondence in Attachment B, Franchisee Allied Waste Services of Santa Clara County is disputing any suggestion that it violated the Franchise Agreement in regards to the workers performing services at the Newby Island Recyclery. According to the Notice, Allied Waste can appeal the Notice, after which point the matter can be taken into court for further litigation. Given the matter is disputed and still ongoing, it is not an adjudicative fact "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b); see also Lee v. City of Los Angeles, 250 F.3d 668, (9th Cir. 2001) (noting it is not appropriate to take "judicial" notice of disputed facts stated in the public record" of the New York State Department of Correctional Services); Von Grabe v. Sprint PCS, 312 F. Supp. 2d 1285, 1294, 1312 (S.D. Cal. 2003) (noting the Notes of the Advisory Committee on Proposed Rules explain that "adjudicative facts" concern "immediate parties—who did what, where, when, how, and with what motive or intent" and that "the tradition, with respect to judicial notice of adjudicative facts, has been one of caution in requiring that the matter be beyond reasonable controversy," finding "the fact must be one that only an unreasonable person would insist on disputing" and denying the request for judicial notice of disputed facts, many of which "form the essence of the controversy at hand" and "would have the effect of preventing Defendant from participating in the adversary process"); Del Puerto Water Dist. v. U.S. Bureau of Reclamation, 271 F. Supp. 2d 1224, 1234 (E.D. Cal. 2003) (refusing to take judicial notice of public and quasi-public documents to the extent their contents were in dispute).

At any rate, the Notice is irrelevant to the issues in this matter. As explained in greater detail in BFI's Opposition to the Request for Review, this matter concerns whether BFI is a joint employer of the Leadpoint Business Services, LLC's ("Leadpoint") employees, who provide contracted-for services at BFI's Newby Island Recyclery. The Notice is not an "adjudicative fact" regarding whether BFI is a joint employer with Leadpoint. Fed. R. Evid. 201(a) ("This rule governs only judicial notice of adjudicative facts."). As the Acting Regional Director of Region 32's Decision and Direction of Election correctly determined, BFI is not a joint employer because it does not share or co-determine with Leadpoint the essential employment conditions of the Leadpoint workers in a manner that meaningfully affects matters such as hiring, firing, discipline, supervision and direction. Regardless of what the Franchisee Agreement requires of the Franchisee and its subcontractors – and leaving aside the fact that Allied Waste Services of Santa Clara County maintains it does not apply to the workers in question – that is a matter of contract, not a legal determination under the National Labor Relations Act, or any other law, that BFI is a joint employer of the Leadpoint workers. See Walker v. Woodford, 454 F. Supp. 2d 1007, 1022-23 (S.D. Cal. 2006) (refusing to take judicial notice of irrelevant facts). Accordingly, Petitioner's Motion should be denied.

Dated thist 4th day of January, 2014.

Respectfully submitted,

Thomas M. Stanek

Elizabeth M. Townsend

Attorneys for Browning-Ferris Industries

of California, Inc.

ORIGINAL e-filed this 14 day of January, 2014, to:

Office of the Executive Secretary National Labor Relations Board 1099 14th Street N.W. Washington, D.C. 20570

COPY of the foregoing e-mailed and mailed this judday of January, 2014, to:

Michael G. Pedhirney (mpedhirney@littler.com) Littler Mendelson 650 California Street, 20th Floor San Francisco, California 94108 Attorney for Leadpoint

Susan K. Garea (sgarea@beesontayer.com)
Beeson Tayer & Bodine
Ross House, 2nd Floor
483 Ninth Street
Oakland, California 94607
Attorney for Teamsters Local 350

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